IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2023] NZHRRT 41**

I TE TARAIPIUNARA MANA TANGATA

Reference No. HRRT 063/2021

UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**ATOM EMET**
	PLAINTIFF
AND	**NEW ZEALAND TRANSPORT AGENCY**
	DEFENDANT

AT WELLINGTON

BEFORE:
Ms J Foster, Deputy Chairperson
Dr NR Swain, Member
Ms L Ashworth, Member

REPRESENTATION:
Mr A Emet in person
Mr JP Papps for defendant

DATE OF HEARING: **6 July 2023**

DATE OF DECISION: **21 November 2023**

DECISION OF TRIBUNAL[1]

[1] In 2016 the Crown by voluntary agreement acquired Mr Emet's home under the Public Works Act 1981. Waka Kotahi New Zealand Transport Agency (NZTA) was responsible for negotiating the acquisition process with Mr Emet.

[2] In November 2021 Mr Emet filed these proceedings alleging NZTA had discriminated against him twice in breach of the Human Rights Act 1993 (HRA). He says this discrimination occurred when NZTA failed to agree to him remaining in the property as a tenant when it was acquired and subsequently rejecting his application to rent the property after it had been acquired, in each case on the grounds of his employment status, disability or family status.

[1] [This decision is to be cited as *Emet v New Zealand Transport Agency* [2023] NZHRRT 41.]

[3] Mr Emet seeks a declaration of a breach of the HRA, damages for pecuniary loss (his additional accommodation, storage, and moving costs) and damages for emotional harm.

[4] NZTA denies it discriminated against Mr Emet. NZTA says the reason Mr Emet was not offered a tenancy when it acquired the property was because of concern about financial risk and the reason his rental application was refused was because of the state he had left the property in and not because of his employment status, disability or family status.

BACKGROUND

[5] In early 2014 NZTA advised Mr Emet and his ex-wife that their property, that Mr Emet was living in, was to be acquired for a proposed roading project, the Wellington Mount Victoria Tunnel duplication.[2] At that time no agreement was reached as to sale terms.

[6] In late June 2015 negotiations were reopened with Mr Emet and his ex-wife for a higher price, after a new valuation for the property was obtained. Mr Emet requested that the terms of sale allow for him to remain as a tenant in the property after it had been acquired.

[7] In early July 2015 NZTA agreed to consider Mr Emet remaining as a tenant, subject to the entry into a standard periodic tenancy at market rental and the relevant checks being done. For this purpose, NZTA gave Mr Emet a pre-tenancy application form to complete, that amongst other things requested details of referees who would provide a reference about credit worthiness, and his consent to a credit check. A few weeks later NZTA sent Mr Emet's and his ex-wife's solicitor a proposed sale agreement. That agreement provided for a tenancy at market rental to be granted to Mr Emet, subject to the pre-tenancy application form being completed and NZTA approval being confirmed following relevant checks.

[8] In mid-August 2015, Mr Emet's ex-wife's solicitor advised NZTA her client agreed to the new price and that she supported any arrangement for Mr Emet to pay an affordable rental. This would allow Mr Emet to remain in the property until it was required as it was important for him and their son, when he stayed with Mr Emet, to have a place to live. The solicitor noted her client understood Mr Emet was on a benefit and his financial position was such that he was unable to afford a market rental.

[9] A week later Mr Emet's solicitor wrote to NZTA advising Mr Emet accepted the price offered for the property was reasonable, but that Mr Emet wanted to remain in the property with free or nominal rent on humanitarian grounds due to his financial and personal situation. The solicitor noted the difficulties Mr Emet was facing. Aside from the acquisition of the property these difficulties were due in large part to his serious head injury (from which he was still recovering) and the breakup of his marriage. It noted the consequences of the property being acquired meant Mr Emet would not be able to continue indefinitely living at the property on his current meagre outgoings and he would not be able to find a comparable property that would meet his needs and those of his ten-year old son, including because his benefit would be significantly reduced as it was

[2] The property was a unit in a building of five units that was to be demolished for the proposed roading project and NZTA set about acquiring all five units in the building.

asset tested. It was also noted that his reduced benefit following acquisition would still allow him to pay the usual outgoings and maintenance as would be expected of a good tenant.

[10] In early September 2015 NZTA advised Mr Emet that his request for a tenancy at nominal rent was refused and that it was reluctant to offer him a tenancy, even at market rental, due to "financial risk and uncertainty over ability to make payments". NZTA said it would prefer to secure a new tenant. NZTA also advised that while it did not formally require the property at that time it was still prepared to purchase it but would require vacant possession on settlement and would be prepared to agree to deferred settlement up to June 2016.

[11] Mr Emet then advised NZTA he accepted the offer without the need for deferred settlement, but this was subject to him completing his relationship property agreement. NZTA was happy to hold the offer open on this basis.

[12] In February 2016 the agreement to sell the property to the Crown was signed. It required settlement within two months and vacant possession on settlement. Mr Emet moved out of the property in April 2016.

[13] In June 2016 Mr Emet saw the property was being advertised for rent by a leasing agent and he applied to rent it. Mr Emet was one of the preferred three tenants and the leasing agent sent their details to Colliers, whom had been appointed to manage the property on NZTA's behalf. On receiving this information Colliers immediately advised the leasing agent it would not be processing Mr Emet's application because of the state he had left the property in when he moved out.

[14] In March 2021 Mr Emet complained to the Human Rights Commission. A mediation was conducted but the parties were unable to resolve the matter.

THE LAW

[15] The HRA under Part 1A prohibits discrimination by the legislative, executive, or judicial branches of the Government or any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.[3]

[16] NZTA is a Crown entity[4] and one of its statutory functions is the management of the state highway system.[5] NZTA was accordingly performing a public function, power or duty when it acquired Mr Emet's property and when it is was managing the property after it was acquired (via its agent Colliers[6]) and must comply with Part 1A of the HRA.[7]

[3] See HRA, s 20I and New Zealand Bill of Rights Act 1990 (NZBORA), s 3.
[4] It was established in 2008 under the Land Transport Management Act 2003, see Part 4 that sets out the object of the Agency and its functions.
[5] Including its planning, funding, design, supervision, construction, maintenance and operation, see Land Transport Management Act, s 95(1)(h).
[6] Colliers was contracted to exercise various property management functions for NZTA and had delegated authority pursuant to the Crown Entities Act 2004, s 73(1)(d) to approve and execute certain residential tenancies (such as the one at issue in this case) on behalf of NZTA.
[7] NZTA's actions were "governmental" in nature and therefore captured by NZBORA, s 3(b). See *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138; [2022] 1 NZLR 459 at [38]-[60].

[17] Section 20L of the HRA, provides when acts or omissions of those persons or bodies are in breach of Part 1A as follows:

> **20L Acts or omissions in breach of this Part**
>
> (1) An act or omission in relation to which this Part applies (including an enactment) is in breach of this Part if it is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990.
>
> (2) For the purposes of subsection (1), an act or omission is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990 if the act or omission—
>
> (a) limits the right to freedom from discrimination affirmed by that section; and
>
> (b) is not, under section 5 of the New Zealand Bill of Rights Act 1990, a justified limitation on that right.
>
> (3) To avoid doubt, subsections (1) and (2) apply in relation to an act or omission even if it is authorised or required by an enactment

[18] Section 19 of NZBORA provides that everyone has the right to freedom from discrimination on the grounds of discrimination in the HRA (that are set out in HRA, s 21).

[19] The prohibited grounds of discrimination on which Mr Emet relies in this case are disability (HRA, s 21(h)); employment status (HRA, s 21(k), which includes being in receipt of a benefit as defined in s 21(k)(ii)); and family status (HRA, s 21(l)) which includes having responsibility for part-time care or full-time care of children as defined in s 21(l)(i)).

[20] Section 5 of NZBORA provides that subject to s 4 of that Act, the NZBORA rights and freedoms may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[21] As provided in HRA, s 20L an action is inconsistent with NZBORA, s 19 if it both:

[21.1] Limits the right to freedom from discrimination affirmed by NZBORA, s 19; and

[21.2] Is not a justified limit under NZBORA, s 5.

[22] The test for what amounts to a limit on the right to be free from discrimination affirmed by NZBORA, s 19 is that set out by the Court of Appeal in *Ministry of Health v Atkinson.*[8] That test requires Mr Emet to prove the following in this case:

[22.1] Firstly, that NZTA's actions amount to differential treatment between him and those in an analogous or comparable situation on the basis of a prohibited ground of discrimination (either his disability, employment status or family status); and

[22.2] Secondly, that the differential treatment imposes a material disadvantage on him.

[23] Mr Emet must show there is a causative link between the treatment complained of and the prohibited ground of discrimination. Discrimination is not however about intent and Mr Emet does not need to prove NZTA intended to engage in prohibited

[8] *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55], [109] and [135]-[136].

discrimination. The differential treatment must be "on the basis" of the prohibited ground, but it does not need to be the sole reason or even the predominant reason for the treatment. The prohibited ground need only be a material factor.[9]

[24] As provided for in HRA, s 20L, once a plaintiff has established that an act or omission has limited the right to freedom from discrimination affirmed by NZBORA, s 19 the issue then becomes whether NZTA can prove that limit is a justified limit under NZBORA, s 5. If NZTA cannot prove the limiting action is a justified limit under NZBORA, s 5 the action is inconsistent with NZBORA s 19 and discrimination in breach of HRA, Part 1A.

ISSUES

[25] The issues the Tribunal must determine are:

[25.1] Whether NZTA's refusal to allow Mr Emet to remain as a tenant when it acquired the property amounts to either disability, employment status or family status discrimination inconsistent with NZBORA, s 19 and therefore a breach of HRA, Part 1A. This includes:

[25.1.1] Whether NZTA's refusal to allow Mr Emet to remain as a tenant is a limit on his right to freedom from discrimination affirmed by NZBORA, s 19; and

[25.1.2] If so, whether it is a justified limit under NZBORA, s 5.

[25.2] Whether NZTA's rejection of the tenancy application Mr Emet made in June 2016 amounts to either disability, employment status, or family status discrimination inconsistent with NZBORA, s 19 and therefore a breach of HRA, Part 1A. This includes:

[25.2.1] Whether the rejection of Mr Emet's tenancy application is a limit on his right to freedom from discrimination affirmed by NZBORA, s 19; and

[25.2.2] If so, whether it is a justified limit under NZBORA, s 5.

[25.3] If NZTA has discriminated against Mr Emet in breach of HRA, Part 1A what is the appropriate remedy?

[26] It is noted that this case is solely about whether NZTA unlawfully discriminated against Mr Emet on either of the two alleged occasions. It is not a review of the process undertaken by NZTA when it acquired his property.

WHETHER NZTA'S REFUSAL TO ALLOW MR EMET TO REMAIN AS A TENANT WHEN IT ACQUIRED THE PROPERTY AMOUNTS TO DISCRIMINATION

[27] It is not in dispute that NZTA refused to allow Mr Emet to remain as a tenant in the property when it was acquired.

[9] *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [49] and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [53] to [64].

[28] What is disputed is whether NZTA's refusal amounts to either disability, employment status or family status discrimination. To determine this, as noted above at [19]-[22], the first issue the Tribunal must consider is:

> **[28.1]** Whether Mr Emet can establish that NZTA's refusal is a limit on his right to be free from discrimination affirmed by NZBORA, s 19 as:
>
> > **[28.1.1]** The refusal amounts to differential treatment of him when compared to persons in an analogous situation **on the basis** of either his disability, employment status or family status; and
> >
> > **[28.1.2]** The refusal imposes a material disadvantage on him.

[29] Mr Emet must first establish that the refusal amounts to differential treatment of him compared to those in an analogous situation "on the basis" of either his employment status, disability or family status. That requires Mr Emet to show the fact he was a beneficiary, had a disability or had part-time care of his son was a material factor in NZTA's refusal.

[30] Mr Emet submitted that the fact he was a beneficiary, had a disability and part-time care of his son was a material factor in NZTA's refusal as:

> **[30.1]** The refusal was a change in NZTA's position that occurred after he informed NZTA he couldn't afford a market rent as he was on a benefit, still recovering from a serious head injury and had part-time care of his son; and
>
> **[30.2]** NZTA had never given a reason as to why they changed their minds as to whether they would consider him remaining in the property as a tenant; and
>
> **[30.3]** There was no legitimate reason for the refusal.

[31] The Tribunal cannot accept Mr Emet's submission that the fact he was a beneficiary, had a disability or had part-time care of his son was a material factor in NZTA's refusal, as the evidence showed the following.

[32] In early July 2015 NZTA was prepared to consider Mr Emet's request that the agreement to purchase the property allow him to remain as a tenant provided that the agreed tenancy was at market rental and subject to the relevant credit checks and approval. NZTA considered a credit check was key so it could assess Mr Emet's creditworthiness before a decision was made. There was concern that he would be a financial risk as a tenant given his body-corporate payment history.[10] Mr Emet had previously failed to pay body corporate fees on time, and these were currently in arrears.[11]

[10] In an email dated 30 June 2015 Carl Raumati of Colliers noted that given Mr Emet's payment history with the body corporate he would be loath to take him on as a tenant and suggested the first step was to get him to submit a tenancy application so a credit check could be done before it committed to a tenancy.

[11] The amount of arrears at that time is not clear but at the time of settlement in February 2016 there was an excess of $6500 in outstanding charges owed to the body corporate. For context it is noted that the property valuation report dated April 2014 records the property's per annum body corporate fees at that time as approximately $2,600.

[33] Mr Emet, however, did not agree to a tenancy at market rental,[12] requesting instead a tenancy for free or at nominal rent; see above at [9].

[34] On 5 September 2015 NZTA advised Mr Emet that his request for a tenancy at nominal rent was not accepted, but it noted his concerns and acknowledged the financial and personal difficulties he faced. NZTA also advised:

> "…..that even if your client was to appear to accept a market rental, it is reluctant to offer a tenancy to him due to financial risk and uncertainty over ability to make payments. In accordance with policy the Transport Agency would therefore prefer to seek a new tenant and manage that process.
>
> You will also appreciate that the Transport Agency does not formally require the subject property at this time and there is some considerable uncertainty as to if/when the roading project will proceed.
>
> In summary, we confirm the Transport Agency is still prepared to purchase the property, but will require vacant possession to be provided on settlement. As discussed, subject to an agreement being concluded in the near future we would be prepared to recommend an agreement on the following basis.
>
> - Deferred settlement date (but no later than June 2016).
> - Crown to pay deposit (say 10%) to owners following execution of agreement by both parties.
> - Vacant possession to be provided on settlement date."

[35] NZTA advised Mr Emet that the reason why it had changed its mind and was now refusing to allow him to remain as a tenant after the property was acquired (even if he was to accept a tenancy at market rental) was that he was considered a financial risk and there was uncertainty as to his ability to pay rent. It was unsurprising NZTA decided this given Mr Emet had made it clear he was unable to pay market rent, that he had sought free or nominal rent and that he had outstanding body corporate fees.

[36] It is legitimate for NZTA to wish to avoid financial risk when it is managing properties it has acquired, including because NZTA policies expressly require it to maximise the income from property that it has acquired while having due regard to obligations as a landlord and road controlling authority. An added factor was that NZTA did not immediately require the property, so any tenancy with Mr Emet may have been for a long duration.

[37] The Tribunal is not persuaded that in these circumstances the fact that Mr Emet was on a sickness benefit, had a disability or had part-time care of his son (that may have contributed to the difficult financial situation he was in) was the reason or even a material factor in the reason for NZTA's refusal to consider him being allowed to remain in the property as a tenant.

[38] It is not the case that NZTA simply assumed Mr Emet would be a financial risk because he was on a benefit, had a disability, or had part-time care of his son. Nor does the Tribunal consider that NZTA's conclusion that Mr Emet was a financial risk was

[12] Mr Emet gave evidence that in late 2015 he was no longer struggling financially as he had reached a settlement with ACC for compensation regarding his head injury and that following this, he could have paid market rent. That may be the case, but there was no evidence before the Tribunal that Mr Emet advised NZTA that he may be in the position to pay a tenancy based on market rent post settlement because of an ACC settlement.

inextricably linked with the fact he was on a benefit, had a disability, or had part-time care of a child.

[39] The Tribunal is not persuaded there is a causative link between NZTA's refusal, and the fact Mr Emet was on a benefit, had a disability, or had part-time care of his son. Rather, the Tribunal considers the material factors in NZTA's decision to decline Mr Emet's tenancy, on the basis that he was a financial risk, were that he had made it explicitly clear he was unable to pay a market rental and his poor history of payment of body corporate fees.

[40] This conclusion is supported by a comparator analysis, which can usefully help to determine whether there has been differential treatment of Mr Emet and those in an analogous situation on the basis of either his employment status, disability or family status.

[41] Comparators are those who are in analogous or comparable circumstances apart from the prohibited ground of discrimination. If all else is the same, it is easier to infer that the reason for any difference in treatment is the prohibited ground of discrimination.[13]

[42] In this case the appropriate comparator is a hypothetical person who is not on a benefit, does not have a disability and does not have care of a child, but whom is otherwise in an analogous situation to Mr Emet, in that NZTA has sought to acquire their property, they have sought to remain as tenant but have made clear they are unable to afford a market rent, have asked that rent be free or nominal and have a poor history of payment of body corporate fees. NZTA would undoubtedly in these circumstances, in order to avoid financial risk, have similarly refused to allow such a person to remain as a tenant after the property was acquired, even if they appeared to accept a market rental.

[43] As the comparator would have been treated no differently to Mr Emet it shows that NZTA's treatment of him in refusing to allow him to remain as a tenant was not based on either his employment status, disability or family status. The comparator analysis shows that the fact Mr Emet was on a benefit, had a disability and had part-time care of his son was not a material factor in NZTA's decision.

[44] Mr Emet has failed to establish that NZTA's refusal to allow him to remain as a tenant in the property after it was acquired amounts to differential treatment between him and those in an analogous situation on the basis of either his employment status, disability or family status.

[45] It follows that Mr Emet cannot establish NZTA's refusal limited his right to be free from discrimination affirmed by NZBORA, s 19 and no issue of justification arises under NZBORA, s 5.

[46] As NZTA's refusal to allow Mr Emet to remain as a tenant in the property after it was acquired has not been found to be inconsistent with NZBORA s 19 his claim that this amounts to discrimination in breach of HRA, Part 1A must be dismissed.

[13] See *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [51]; *Attorney-General v IDEA Services Ltd (in stat man)* [2012] NZHC 3229, [2013] 2 NZLR 512 (*IDEA Services*) at [139].

WHETHER NZTA'S REJECTION OF MR EMET'S TENANCY APPLICATION IN JUNE 2016 AMOUNTS TO DISCRIMINATION

[47] Mr Emet claims that NZTA's rejection of his tenancy application (via its agents Colliers) in June 2016 was based on his employment status, disability or family status and therefore amounts to discrimination inconsistent with NZBORA, s 19 and a breach of HRA, Part 1A.

[48] This claim can be dealt with briefly as it cannot be made out on the facts. The relevant facts are not in dispute and are as follows.

[49] Mr Emet moved out of the property in April 2016 after NZTA had acquired it.

[50] In June 2016 Mr Emet saw the property was advertised for rent by Oxygen Real Estate and he applied to rent it by completing a tenancy application form. Mr Emet's evidence was that by this time his financial circumstances had improved, and the property was being advertised at a lesser rent than the market rental NZTA had proposed in July 2015.

[51] Oxygen Real Estate assessed Mr Emet as meeting the eligibility criteria and he was one of three preferred tenants whose details were sent to Colliers. After receiving this information Colliers on 17 June 2016 emailed Oxygen Real Estate making it clear it would not be processing Mr Emet's application as the email stated:

> "In regards to Atom Emet – he was in this flat previously before NZTA bought it. I am not sure if you are aware but he left the flat in an absolute state, which required approximately $3,000 spent for cleaning and repairs. It is almost laughable that he would apply!"

[52] This email clearly shows Mr Emet's tenancy application was rejected because of the condition he had left the property in when he vacated it in April 2016.

[53] Mr Emet disputed the legitimacy of Colliers failure to process his application on this basis, noting the requirement for him to leave the property in vacant possession did not require it to be in prime and pristine condition and that the damage to the property was pre-existing.

[54] Regardless of whether it was legitimate for NZTA to reject his application on this basis[14] it is clear this was the reason why his application was rejected.

[55] The rejection of Mr Emet's application was not therefore in any way based on his employment status, disability or family status.

[56] Given this Mr Emet cannot establish that NZTA's rejection of his tenancy application in June 2016 amounts to differential treatment between him and those in an analogous situation on the basis of either his employment status, disability or family status.

[14] NZTA submitted it was a legitimate basis as regardless of what standard of cleanliness Mr Emet was legally required to leave the property in on settlement and whether he met that standard the condition in which he left the property was a matter to be taken into account when rejecting his application. NZTA submitted that it provides an indication of the standard to which he would likely keep the property as a tenant and in return how much NZTA would likely have to incur for cleaning repairs.

[57] Accordingly, he cannot show NZTA's rejection of his tenancy application in June 2016 limited his right to be free from discrimination affirmed by NZBORA, s 19 and no issue of justification arises under NZBORA, s 5.

[58] As NZTA's rejection of Mr Emet's tenancy application in June 2016 has not been found to be inconsistent with NZBORA, s 19, his claim that this amounts to discrimination in breach of HRA, Part 1A must be dismissed.

CONCLUSION

[59] Mr Emet's claim has been dismissed as he has failed to establish that either NZTA's refusal to allow him to remain as a tenant when voluntarily acquiring his property or NZTA's rejection of his tenancy application after the property was acquired amounts to either employment status, disability or family status discrimination in breach of HRA, Part 1A.

[60] While the Tribunal has dismissed Mr Emet's claim, it acknowledges that the events the claim is based on must have been difficult for him given all the circumstances. Those circumstances include that he was vulnerable given he was recovering from injury, he had a part-time dependent, he was going through a divorce, he had to move from the property that had been his and his child's home for many years and the ongoing housing crisis in New Zealand meant he was unable to find similar suitable accommodation. It was noted by NZTA that in March 2021, prior to him complaining to the Human Rights Commission, it had approved a claim by Mr Emet for reimbursement or partial reimbursement of storage and moving costs, but he had rejected that amount as too small. The Tribunal assumes that offer is still open to Mr Emet should he wish to take it up.

[61] No issues of costs arise as they are not sought by NZTA.

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Ms J Foster	**Dr NR Swain**	**Ms L Ashworth**
Deputy Chairperson	**Member**	**Member**